

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

STEPHEN R. HEIMBERG, derivatively on behalf
of SYNACOR, INC.,

Plaintiff,

v.

HIMESH BHISE, WILLIAM J. STUART,
JORDAN LEVY, MARWAN FAWAZ, GARY L.
GINSBERG, ANDREW KAU, MICHAEL J.
MONTGOMERY, and SCOTT MURPHY,

Defendants,

and

SYNACOR, INC.,

Nominal Defendant.

Case No. 1:18-cv-01407-EAW

**JOINT STIPULATION AND
[PROPOSED] ORDER
CONSOLIDATING AND
STAYING ACTIONS**

MATTHEW TUCKER, derivatively on behalf
of SYNACOR, INC.,

Plaintiff,

v.

HIMESH BHISE, WILLIAM J. STUART,
JORDAN LEVY, MARWAN FAWAZ, GARY L.
GINSBERG, ANDREW KAU, MICHAEL J.
MONTGOMERY, SCOTT MURPHY, and
ELISABETH B. DONOHUE,

Defendants,

and

SYNACOR, INC.,

Nominal Defendant.

Case No. 1:19-cv-00052-EAW

Plaintiffs Stephen R. Heimberg (“Heimberg”) and Matthew Tucker (“Tucker”) (collectively, “Plaintiffs”), Nominal Defendant Synacor, Inc. (“Synacor”), and Defendants Himesh Bhise, William J. Stuart, Jordan Levy, Marwan Fawaz, Gary L. Ginsberg, Andrew Kau, Michael J. Montgomery, Scott Murphy, and Elisabeth B. Donohue¹ (collectively, the “Individual Defendants,” and together with Synacor, “Defendants”), by and through their respective counsel, hereby stipulate and agree as follows, subject to this Court’s approval:

WHEREAS, on December 4, 2018, Plaintiff Stephen R. Heimberg commenced a shareholder derivative action in this Court captioned *Heimberg v. Bhise*, No. 1:18-cv-01407-EAW;

WHEREAS, on January 9, 2019, Plaintiff Matthew Tucker commenced a shareholder derivative action in this Court captioned *Tucker v. Bhise*, No. 1:19-cv-00052-EAW;

WHEREAS, the complaints in the above-captioned actions (the “Actions”) purport to assert substantially identical claims derivatively on behalf of Synacor against the Individual Defendants for breach of fiduciary duty, as well as violations of Section 14(a) of the Securities Exchange Act of 1934, based on the same alleged misstatements between May 2016 and March 2018 about Synacor’s work on a web portal for AT&T;

WHEREAS, a securities fraud class action, arising from facts substantially identical to those alleged in the Actions and filed against Synacor and Defendants Bhise and Stuart, is pending in the United States District Court for the Southern District of New York, *see Shreiber v. Synacor, Inc.*, No 1:18-cv-02979-LGS (S.D.N.Y. filed Apr. 4, 2018) (the “Securities Class Action”);

¹ Ms. Donohue is named as a defendant in *Tucker*, but not in *Heimberg*.

WHEREAS, a motion to dismiss the Securities Class Action in its entirety is fully briefed as of February 15, 2019 and is pending decision;

WHEREAS, in the event these Actions are not voluntarily dismissed following a decision on the motion to dismiss in the Securities Class Action, Defendants intend to move to transfer the Actions to the Southern District of New York forthwith;

WHEREAS, Plaintiffs do not agree that the Southern District of New York is the appropriate venue for the Actions, nor do Plaintiffs agree that Synacor's forum selection clause is applicable to the Actions and may oppose any transfer motion made by Defendants; and

WHEREAS, Plaintiffs and Defendants nevertheless agree that staying the Actions pending a decision on the motion to dismiss in the Securities Class Action serves the interests of judicial economy and submit this Joint Stipulation without waiving any of their respective rights, arguments or claims related to jurisdiction or venue.

IT IS HEREBY STIPULATED AND AGREED among the undersigned parties, subject to the Court's approval, that:

1. Because the Actions raise common issues of law and fact, and because proceeding with one action will promote judicial economy and administrative efficiency, the Actions are hereby consolidated into one action, bearing the caption "*In re Synacor Derivative Litigation*" (the "Consolidated Action");
2. To streamline any further proceedings in this Court on behalf of Plaintiffs, promote administrative efficiency and communications between the parties and the Court, any communications to Plaintiff shall be to Robbins Arroyo LLP and Law Offices of Beth A. Keller, P.C. which firms shall also coordinate any filings

and correspondence on behalf of Plaintiffs in the Consolidated Action in this Court during the pendency of the stay or until further order of the Court.

3. The complaint filed in *Tucker v. Bhise*, No. 1:19-cv-00052-EAW, shall be designated as the operative complaint in the Consolidated Action;
4. The Consolidated Action is hereby stayed until the Southern District of New York issues a decision on the motion to dismiss in the Securities Class Action;
5. Defendants shall not be required to answer or otherwise respond to the operative complaint or any amended complaint during the pendency of the stay; and
6. Plaintiffs agree that the stay herein shall be without prejudice to any later motion by Defendants to transfer to the Southern District of New York pursuant to 28 U.S.C. § 1404; and that Defendants reserve all rights conferred by the forum selection clause in Synacor's Certificate of Incorporation, which provides that "[u]nless [Synacor] consents in writing to the selection of an alternative forum, the Court of Chancery in the State of Delaware shall be the sole and exclusive forum for [] any derivative action or proceeding brought on behalf of [Synacor] [or] any action asserting a claim of breach of fiduciary duty owed by any [Synacor] director, officer or other employee . . . to [Synacor] or [its] stockholders." *See* Fifth Amended and Restated Certificate of Incorporation of Synacor, Inc. (Feb. 15, 2012), art. V, § E.

Dated: May 2, 2019

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* *pro hac vice* applications forthcoming

Respectfully Submitted,

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Counsel for Defendants

SO ORDERED:

Honorable Elizabeth A. Wolford
United States District Judge